IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:::

JUDGMENT

Daula Ram.
vs.
Smt. Sajjan Kanwar.

S.B.CIVIL REVISION PETITION NO.324/2006 UNDER SECTION 115 CPC AGAINST THE ORDER DATED 29.8.2005 PASSED BY SHRI O.P. SINGH, ADDITIONAL DISTRICT JUDGE, BALI, DISTRICT PALI IN CIVIL SUIT NO.33/2004.

DATE OF JUDGMENT ::: 31.5.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.R Choudhary for Mr.S Srimali, for the petitioner.
Mr.DK Sharma for Mr.H Maheshwari, for the respondent.

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BY THE COURT:

REPORTABLE

Heard learned counsel for the parties.

The petitioner/defendant is aggrieved against the

order dated 29.8.2005 by which the trial court dismissed the petitioner's application filed under Order 37 Rule 4 CPC for setting aside the decree passed under Clause (a) of Sub-rule (6) of Rule 3 of Order 37 CPC as the petitioner/defendant did not sought leave to defend the suit within a period of 10 days as required by Sub-rule (5) of Rule 3 of Order 37 CPC.

Learned counsel for the petitioner has shown the certified copy of summon in Form No.4A issued by the trial court under Order 37 Rule 3 CPC and submitted that he received the summon wherein it is clearly mentioned that the defendant is to attend the Court on 24.7.2004. The petitioner/defendant was sick on 24.7.2004 and, therefore, court not appear in Court on 24.7.2004. On 24.7.2004, the trial court passed the money decree against the petitioner/defendant. The next day was Sunday, therefore, the petitioner submitted application for setting aside the ex-parte decree on 26.7.2004. That application was dismissed by the trial court on the ground that the petitioner was supposed to submit his leave to defence within ten (10) days form the date of service of summons upon him and, therefore, the plea of the petitioner that he was sick on 24.7.2004 was irrelevant. The trial court for this reason dismissed the petitioner/defendant's application for setting aside the decree as no cause has been shown

by the petitioner/defendant for his not submitting application for leave to defend the suit under Sub-rule (5) of Rule 3 of Order 37 CPC.

I perused the provisions contained in Order 37 CPC as well as Forms no.4 and 4A prescribed in Appendix-B attached to Civil Procedure Code. Form No.4 is required to be served upon the defendant as provided under Order 37 Rule 2(2) CPC whereas the summon for judgment as prescribed in Form No.4A is required to be served upon the defendant under Order 37 Rule 3(4) CPC. There is a lot of difference in the language used in Forms No.4 and 4A. Forms No.4 and 4A prescribed in Appendix-B are reproduced as under :-

"No.4

SUMMONS IN A SUMMARY SUIT

(O.XXXVII, r.2)

(Title)

To

_____ (Name, description and place of residence)

"WHEREAS _____ has instituted a suit against you under Order XXXVII, of the Code of Civil Procedure, 1908, for Rs._____ and interest, you are hereby summoned to cause an appearance to be entered for you, within ten days from the service hereof, in default whereof the plaintiff will be entitled, after the expiration of the said period of ten days, to obtain a decree for any sum not exceeding the sum of Rs._____

and the sum of Rs._____ for costs, together with such interest, if any, as the Court may order.

If you cause an appearance to be entered for you, _____ the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to move the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to defend.

GIVEN under my hand and the seal of the court, this _____ day of _____ 19___/20___.

Judge”

“No.4A

SUMMONS FOR JUDGMENT IN A SUMMARY SUIT

(O.XXXVII, r.3)

(Title)

In the _____ Court, at _____ Suit NO._____ of 19___/20___.

XYZ _____ Plaintiff

Versus

ABC _____ Defendant

“Upon reading the affidavit of the plaintiff the Court makes the following order, namely :-

Let all parties concerned attend the Court or Judge, as the case may be, on the _____ day of _____ 19___/20___, at _____ O' clock in the forenoon on the hearing of the application of the

plaintiff that he be at liberty to obtain judgment in this suit against the defendant (or if against one or some or several, insert names) for Rs._____ and for interest and costs.

Dated the _____ day of _____ 19___/20___."

From a perusal of Form No.4, it is clear that this form clearly informs the defendant that the summon has been served upon him as the plaintiff filed the suit for recovery of the ascertained amount and for interest thereon. It is also informed that the defendant is required to put in appearance within ten days from the service of summon upon him and in default thereof, the plaintiff will be entitled to decree of sum mentioned in the summon and for the cost together with interest. Not only this, the defendant is being informed by summon in Form No.4 what he is to do after service of summon upon him under Order 37 Rule 2 CPC it specifically informs the defendant that "at any time within ten days of such service enter an appearance ....." ".... and he should file in court an address for service of notice on him.". It further informs the defendant that in case, the defendant will put in appearance, what will be the next procedure which will be followed. In the summon itself, it is mentioned that in case, the defendant will put in appearance, the plaintiff will thereupon serve the

defendant another summon which shall be a summon for judgment and it is mentioned in the summon "at the hearing of which you will be entitled to move the Court for leave to defend the suit". In addition to above, in the summon in form no.4, it is mentioned that how the leave to defend can be obtained by the defendant.

From the above summon so far as first part of summon is concerned informing the defendant to put in appearance within 10 days from the time of service of summon, it is explicitly clear from the summon that the defendant has to put in appearance in Court within ten days of service of summon upon him. And it is also clear, in default of his appearance what will be the consequence. The second para of summon also informs the defendant that he has to put only appearance in response to the summon under Order 37 Rule 2 CPC and thereafter he is to wait for service of another summon i.e. summon for judgment. But by the third para of the summon, the defendant stands informed that the defendant is entitled to seek permission of the Court to defend the suit by satisfying by affidavit or otherwise that there is a defence to suit on merits but in para 3 of the summon in Form No.4, the time limit for moving application for leave to defend is not provided. Not only this contrary to Sub-Rule (5) of Rule 3 of Order 37 CPC, it say that, "at the time ..... move the court for leave to defend th

suit". The defendant cannot seek leave to defend "at the hearing" on the date given in the said summon for judgment.

Be it as it may be, as stated above, the language of form no.4A prescribed under Order 37 Rule 3 CPC in fact runs contrary to Sub-Rules 4 and 5 of Rule 3 of Order 37 CPC and the Form No.4A is not properly framed so as to inform the defendant what is expected from the defendant in response to the service of summon upon him under Order 37 Rule 3 CPC. Rather say Form No.4A misdirects the defendant. Sub-Rules 4 and 5 of Rule 3 of Order 37 CPC are as under :-

> "(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No.4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.
>
> (5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just."

Sub-Rule 4 of Rule 3 says that a summons for judgment in Form No.4A as prescribed in Appendix B or such other Form as may be prescribed from time to time, shall be returnable not less than ten days from the date of service ..... whereas as per Sub-rule (5) of Rule 3 of Order 37 CPC, if the defendant will not seek leave to defend within ten days from service of summon upon him, he is to suffer decree against him in the suit as per Clause (a) of Sub-rule (6) of Rule 3 of Order 37 CPC.

Sub-Rule 5 of Rule 3 provides that the defendant may, at any time within ten days from the service of summons (in Form No.4A) for judgment may apply for leave to defend such suit by filing affidavit or otherwise by disclosing the facts on the basis of which he may satisfy the Court that there are sufficient grounds for granting leave to defend. In contravention to Sub-Rule 5, Form No.4A directs the defendant to appear on a fixed date which in view of Sub-Rule 4 shall be beyond the period of ten days from the date of service of summons. The summons as prescribed by Form No.4A specifically directs the defendant to appear in the Court on the day as mentioned in the summons by the Court. If the defendant obeys the said direction of the court and appears on the date fixed for the case as mentioned in the summon, then he is bound to face decree against him. Further, in form no.4A, it is

mentioned that the Court on the day fixed by the Court will hear "on the application of the plaintiff that he be at liberty to obtain judgment in this suit against the defendant for rupees as mentioned in the summons and for interest and costs." The summons nowhere says that before the date as mentioned in the summons, he is to move any application or submit any affidavit for seeking permission to defend the suit filed by the plaintiff. Therefore, the summon as prescribed in Form No.4A is contrary to Sub-rules (4) and (5) of Rule 3 of Order 37 CPC and is required to be amended appropriately.

Another form can be prescribed which is permissible as per Order 37 Rule 3(4) CPC itself wherein the language has been used is "or such other form as may be prescribed from time to time", therefore, new form is required to be prescribed forthwith for service upon the defendant as provided in Sub-Rules 4 and 5 of Rule 3 of Order 37 CPC.

This Court is further of the view that the entire procedure of sending two summons in one suit, that too in money suit and further of specific nature of money suit, is only absolutely unnecessary burden upon the Court, Court staff and initially for the plaintiff and thereafter even for the defendants. In fact, Order 37

Rule 3(1) CPC virtually says in this language “that the Court has your (defendant's) complete address and on that address, we (Court) reached to you. Now you appear in the Court and submit your address in the Court (and that address is already with Court). You (defendant) may appear in person or through pleader but we (court) will not contact you through your authorised agent, the pleader nor supply him the copy of the application and affidavit which may be filed by the plaintiff in the suit though it is provided in the General Rules (Civil) that before filing any application in the Court, copy of application or affidavit will be supplied to the counsel for the defendant”.

This Court is of the view that there is no justification for asking a defendant to appear only for the purpose of furnishing address in the Court when the Court has already complete address of the defendant, then instead of following procedure of two summons for summary suit (contrary to one summon even in title suit), the procedure for service of one summons in one suit as prescribed for even full trial of all suits having more stakes can be followed and would be appropriate. But it is for consideration of law and rule framing authorities.

From the facts, it appears that the petitioner, in

the present case, presumed that he was to appear on the date mentioned in the summon which was issued under Order 37 Rule 3 CPC. Not only this, it appears from the plea taken by the petitioner that even his counsel was also satisfied that the petitioner's reason for absence on the date given in the summon under Order 37 Rule 3 CPC was sufficient for setting aside the ex-parte decree passed by the court. Therefore, instead of getting reason for absence of the petitioner within a period of ten days from the service of summon under Order 37 Rule 3 CPC, the application has been filed by the petitioner through his counsel disclosing the reason for his non-appearance in the court in response to the summon under Order 37 Rule 3 CPC on the date which was mentioned in the summon under Order 37 Rule 3 CPC. Like expert, the lawyer even after 30 years of remaining in force the law and summon as prescribed in Form No.4A was misled by the Form No.4A then a litigant who could have appeared in time if he would have been informed to appear on or before the date mentioned in summon than the defendant cannot be punished for none of his fault and because of the reason that he and his advocate understood that they have to satisfy the court for their absence in court for the date mentioned in the summon and on which date, the defendant was directed to appear in the Court.

Since the petitioner's application for setting aside the ex-parte decree was dismissed by the trial court on the ground that the petitioner's absence on 24.7.2004 is not relevant but relevant was the fact that he did not submit defence within 10 days from the date of service of summon served upon the petitioner under Order 37 Rule 3 CPC. Therefore, only reason for dismissal of petitioner's application for setting aside the ex-parte decree was due to non-disclosure of the reason by the petitioner for his absence or his not filing the defence within 10 days from the date of service of summon under Order 37 Rule 3 CPC, then in that fact situation, the facts of the case clearly discloses that the defendant (petitioner) misled by the language used in Form No.4A prescribed by CPC itself and, therefore, he could not submit application for leave to defend within a period of ten days from service of summons under Order 37 Rule 3 CPC and, therefore, because of this fact the decree dated 24.7.2004 deserves to be set aside as there was sufficient cause for not submitting the application for leave to defend by the appellant within the period prescribed by Sub-Rule (4) of Rule 3 of Order 37 CPC.

In view of the above, this revision petition is allowed and the impugned order dated 29.8.2005 is set aside, the application for setting aside the decree is

allowed. The petitioner may now submit his application for leave to defend within a period of 10 days from the opening of the Courts after summer vacations or within 10 days from the receipt of certified copy of this order, whichever is later.

(PRAKASH TATIA), J.

S.Phophaliya